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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re the Marriage of CLIFF FELDMAN  
and MARGARET D. DUBIN.

CLIFF FELDMAN,  
Appellant,  
v.  
MARGARET D. DUBIN,  
Respondent.

A151802

(Alameda County  
Super. Ct. No. RF10521580)

Cliff Feldman (Father) sought to reduce his child support payments after losing his job and receiving unemployment benefits, which lowered his monthly income from about \$11,500 to \$1,950. The trial court, unable to discern how he was maintaining his lifestyle given his reduced income, denied the motion. We reverse and direct the trial court to hold a new hearing and to reconsider its award of attorney fees to Father's former spouse, Margaret Dubin (Mother).

The trial court also declined Father's request to enforce prior seek work and discovery orders. We affirm those rulings.

**FACTS**

**A.**

The parties were married in 2002 and had two sons. Father filed a petition for dissolution in 2010. We summarized the early proceedings in a prior appellate opinion. (See *In re Marriage of Feldman & Dubin* (July 9, 2015, A139819) [nonpub. opn.]

(*Feldman*).) As relevant to this appeal, the trial court in 2013 found Father committed an act of domestic violence in 2010, but it rejected Mother's allegations of ongoing domestic violence and concluded she engaged in aggressive and harassing behavior herself. The court found it was in the children's best interest to be involved in team sports and, in light of the parents' contentious relationship, gave Father authority to choose the children's extracurricular activities if the parents could not agree. We affirmed that order.

(*Feldman, supra*, A139819.)

The parties have continued to require court intervention to resolve conflicts. In October 2014, the court ordered Mother to seek at least five jobs a week, spend at least 20 hours a week on the job search, and submit bimonthly logs of her activity to the Alameda County Department of Child Support Services (the Department). In January 2015, the court ordered Father to pay monthly child support of \$672, based on Father's monthly income of \$11,531.33 (\$11,131.33 in pay plus a \$400 car allowance) and Mother's monthly income of \$4,350 (\$2,000 imputed pay, \$1,850 rental income, and \$500 investment income). In 2016, the trial court settled disagreements about reimbursements for the children's add-on expenses, including substantial costs associated with the children's participation in the 2014-2015 and 2015-2016 ski team seasons.

## **B.**

The current proceedings began in October 2016, when Father moved to modify his child support payment, enforce the seek work order, and sanction Mother for not complying with an October 2014 discovery order. With respect to child support, Father claimed he recently lost his job and had few assets. He asked the court to impute additional rental income to Mother on the ground she charged below-market rent for a rental apartment and to impute additional salary on the ground she had disregarded the seek work order. Mother opposed the motion and asked the court to impute income to Father based on his earning capacity.

In a December 2016 income and expense declaration, Father stated he lost his job on September 23, 2016, and he was receiving \$450 per week in unemployment payments. He claimed \$7,080 in monthly living expenses; the largest items being housing (\$3,170),

credit card and personal loan payments (\$1,500), and food (\$800). He reported cash savings of \$3,900, outstanding personal loans of \$13,900, and credit card balances of \$17,176.

At trial, five months after being laid off, Father testified his only income was unemployment insurance, and he had received no severance pay. His job search had been unsuccessful due to no openings in his field and because an Internet search of his name disclosed his domestic violence history. He also testified he could not access his retirement account, he had not taken money from two deferred compensation accounts, he had no investment income, he had not received any personal loans in the past year, and his only asset was a 2007 Toyota with 198,000 miles. He was making up for the lost income, in part, by “leveraging one credit card against another.”

Mother contested Father’s testimony that he could not obtain a new high-paying job, and she suggested his lifestyle was inconsistent with his alleged drop in income. She said Father paid several thousand dollars for the children’s ski team expenses, which included a house rental from December to March, enrollment in the team, ski passes for the children (plus passes for Father and his girlfriend), and equipment. Father testified those expenses were paid before he lost his job, and his only ongoing costs were for gas and food. In his December 2016 income and expense declaration, he reported \$250 per month for “Kids sports, misc.” He drew the court’s attention to prior court orders regarding the kids’ participation in the ski team, and the court agreed to take judicial notice of all prior orders related to child support.

Mother testified she had complied with the seek work order. She applied for work in November and December 2014, and the Department confirmed receipt of logs for those months. Thereafter, she held a part-time job and later went on disability: she had been diagnosed and treated for complex posttraumatic stress disorder, which prevented her from working except part-time in a calm environment. She could not earn the \$2,000 in imputed income she previously agreed to. Mother received state disability benefits for a year and had a pending application for federal disability benefits. She was training to become a yoga instructor and expected to graduate by October 2017. She was charging

fair market rent for her rental property as demonstrated by detailed comparisons to similar properties in her area.

### C.

In a March 8, 2017, written order, the court denied Father’s motion to modify child support on the ground Father “failed to satisfy his burden of proof with credible evidence.” Father “presented evidence that his income has decreased, that he is receiving unemployment, effective September 2016, when his job was terminated after nine years and nine months of employment. He testified that he does not have a retirement and that his only income is limited to \$1950 a month. He has not recently received money from family members or friends and he has only \$3900.00 in his savings account. . . . [¶] . . . [Mother] specifically contends that [Father] is not credible as he is unable to support his lifestyle giv[en] his limited monthly income. [¶] The burden of proof of a modification lies with . . . [Father].

“[Father] declares in the [income and expense declaration, or I&E] monthly expenses of \$7980 [*sic*<sup>1</sup>] a month, and it was disclosed on cross-examination that he rents a ski rental . . . in the Lake Tahoe region for the 2016-2017 ski season. He testified he paid for the rental in 2016 before his employment ended; the ski rental is not listed on his I&E. [¶] The I&E declaration also reads he pays \$250 monthly for the sports activities of both children. However, the children are members of the Squaw Valley Ski Team for 2016-2017 and [Mother] stated that in the past the costs were more than \$3000 per child. Although neither party stated the specific costs of the children’s participation on the ski team for 2016-2017, the court references the court order of January 6, 2016 wherein the court stated that ski team related fees for 2014/15 were \$4,546 and for 2015/16 were \$4,998 for both children. [¶] The court also notes that in past child support orders, the calculation of guideline child support included a retirement contribution of \$711 a month.

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<sup>1</sup> The court’s order mistakenly referred to monthly living expenses of \$7980, rather than \$7080. We reject Father’s argument that this typographical error reflected judicial bias. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1112, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

“The court finds that [Father’s] income of \$1950 a month cannot support his lifestyle and monthly expenses, nor can it even come close to satisfying . . . even the basic obligations before considering the additional costs for the ski related activities of the children. The court will not speculate as to whether petitioner failed to disclose financial information or perhaps there is additional income that was not reported. However, the court finds that [Father] failed to satisfy his burden of proof with credible evidence.” The court also found insufficient evidence to impute income to Father or additional income to Mother. The court did not expressly rule on Father’s motion to enforce the seek work and discovery orders. It awarded Mother \$1,500 in attorney fees.

Father filed a motion to set aside, vacate, or reconsider the order. He argued the evidence of his unemployment was undisputed, and the court erred in finding his lifestyle was inconsistent with his reported income and assets. Father filed an amended income and expense declaration reflecting a substantial decrease in his living expenses. The court held a hearing on the motion, took testimony from Mother and Father, and denied the motion without issuing a written order.<sup>2</sup>

## **DISCUSSION**

### **I.**

#### *Motion to Modify Child Support*

We agree with Father the trial court erred in finding he had not satisfied his burden of showing a material change in his financial condition despite the loss of his job and drastic drop in income.

### **A.**

We begin with some brief background on the statutory scheme governing child support orders, which is important for understanding relevant limits on the trial court’s discretion.

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<sup>2</sup> Father did not include a transcript or settled or agreed statement of the hearing in the appellate record.

Given the Family Code’s detailed and strict rules for child support orders, “the only discretion a trial court possesses is the discretion provided by statute or rule.” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283; see Fam. Code, § 4052.)<sup>3</sup> Courts must adhere to a “statewide uniform guideline” (§ 4050), which is better described as a rigid algebraic formula (§ 4055). The main inputs to the guideline formula are the parents’ gross incomes (see § 4058), specified deductions that yield the parents’ net disposable income (see §§ 4059–4060), and each parent’s share of the child’s physical custody. (§ 4055.) The resulting calculation is presumptively correct in all cases (§ 4057; *Y.R. v. A.F.* (2017) 9 Cal.App.5th 974, 983), and the trial court may only adjust the calculation by stating—in writing or on the record—the guideline amount, the reason for a different amount, and the reason why the different amount is consistent with the best interests of the child. (§ 4056; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 144.) The appellate courts have long bemoaned the inflexibility of this system, but “the grisly math must still be done.” (*Wilson v. Shea* (2001) 87 Cal.App.4th 887, 891.)

A party seeking to modify a support order must demonstrate a material change in financial circumstances. (*In re Marriage of Usher* (2016) 6 Cal.App.5th 347, 357.) The Family Code does not specify rules for determining when a change in circumstances is sufficient to warrant modification of a support order. (*Id.* at p. 358.) “ ‘Each case stands or falls on its own facts, but the overriding issue is whether a change has affected either party’s financial status.’ ” (*Ibid.*) Given the importance of income to the guideline formula, generally it is crucial for a court to determine accurately a party’s current income (§ 4058, subd. (a); *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 327, 337 [reversing child support order based on evidence of lifestyle rather than income]), or to impute income to a party based on the party’s ability and opportunity to obtain work. (§ 4058, subd. (b); *In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 931 [“figures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation”].)

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<sup>3</sup> Undesignated statutory references are to the Family Code.

## B.

Here, the court ruled Father failed to meet his burden of proving changed circumstances despite losing his job. We conclude the court abused its discretion.

While loss of a job is not dispositive (see, e.g., *In re Marriage of Cohen* (2016) 3 Cal.App.5th 1014, 1019, 1021–1022 & fn. 7 [affirming trial court’s refusal to modify child support where father’s lower salary was offset by \$500,000 signing bonus]), it certainly can cause a material change in a party’s income and financial condition. *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375 (*Mosley*) is instructive. A former husband, Paul, sought to modify spousal and child support orders, which were based on Paul’s prior salary of \$447,150 per year at a law firm. After Paul lost that job, he accepted a position with a home builder at a salary of \$205,000, plus a discretionary bonus. (*Id.* at pp. 1380–1381.) Paul produced evidence he had no significant savings, the potential bonus could be zero, and he was borrowing money to pay the support payments of \$10,047 per month, which equaled his net income. (*Id.* at pp. 1384–1385.) The trial court denied the motion, but the Court of Appeal reversed, holding that Paul “met his burden to show a material change in circumstances.” (*Id.* at p. 1385.)

Here, as in *Mosley*, the trial court abused its discretion. Father produced evidence he lost his job, was relying on unemployment benefits for income, holds no income-producing assets, and was borrowing money to try to cover his expenses.<sup>4</sup> Although Mother asked the court to impute income equal to Father’s prior salary based on Father’s earning capacity, the court declined to do so.

The court speculated, but did not find, Father had another source of income based on his lifestyle, i.e., his level of spending after losing his job. Evidence of lifestyle,

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<sup>4</sup> In her initial pro per opposition to Father’s motion, Mother claimed Father “continues to be paid his \$14,500/month salary/benefits (Exh. A).” However, the exhibit cited was not admitted at trial and, while the assertion appeared in her sworn declaration, she did not purport to have personal knowledge of the matter. Notably, Mother’s attorney did not reassert the claim in her trial brief or at trial. In fact, the parties stipulated Father was receiving \$1,950 in monthly unemployment benefits, which the court cited in its decision as Father’s income.

however, is not a substitute for income. (*In re Marriage of Loh, supra*, 93 Cal.App.4th at p. 327.) In any case, the record does not support an inference, suggested by the court, that Father's spending on the children's ski activities demonstrated he had an undisclosed source of income. Father testified without contradiction he prepaid all the season's expenses, except for gas and food, before he lost his job.

Finally, in addition to failing to make findings about Father's income, the court overlooked the parties' stipulations that other guideline formula factors had changed, including the parents' tax filing status and Mother's investment income.

We conclude the court erred when it found no material change in the parties' financial circumstances.

## II.

### *Motion to Enforce Seek Work Order*

We reject Father's contention the court erred in failing to enforce the seek work order.

Mother's testimony at trial constituted substantial evidence of compliance with the seek work order while she was unemployed and able to work. Mother testified she applied for jobs in November and December 2014, and the Department acknowledged receipt of logs for those months. Thereafter, she obtained part-time work and subsequently became disabled with posttraumatic stress disorder. She nevertheless was in training to become a yoga instructor and expected to graduate by October 2017.

We also reject Father's contention that Mother was collaterally estopped from arguing she was unable to work because of posttraumatic stress disorder. He cites various court orders and findings from 2013 and 2014. For collateral estoppel to apply, the issue in the prior proceeding must be identical to the issue currently before the court, and the issue must have been actually litigated and necessarily decided in the prior proceeding. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1505.) None of these factors is present here. In 2013 and 2014, the court did not decide whether Mother was able to work in 2016, nor did it decide whether any domestic abuse prior to 2014 later contributed to her posttraumatic stress disorder.

### **III.**

#### *Motion to Enforce Discovery Order*

We summarily reject Father's one-sentence argument that the court erred in ignoring his request to enforce a 2014 discovery order. The argument is forfeited because Father does not support it with a separate heading, record citations, or legal authority. (Cal. Rules of Court, rule 8.204(a)(1)(B), (C).)

### **IV.**

#### *Attorney Fee Award*

Because we reverse the order denying Father's motion to modify child support and remand for further proceedings, we also reverse the court's fee award. Mother sought fees pursuant to sections 270 to 271, which are in the nature of sanctions, and sections 2030 and 2032, which authorize a fee award based on the relative financial circumstances of the parties. On remand, after resolving Father's motion, the court shall reconsider the fee award in light of its findings about the parties' financial circumstances and the overall conduct of the proceedings.

### **DISPOSITION**

The March 8, 2017 order is affirmed to the extent it denied Father's motions to enforce the seek work and discovery orders. The order is reversed as to Father's motion to modify child support and Mother's request for attorney fees. On remand, the court shall hold a new evidentiary hearing at which both sides may present evidence, including recent tax returns, updated financial declarations, and findings on the relevant guideline factors. (See *In re Marriage of Cohn*, *supra*, 65 Cal.App.4th at p. 931.) Father's and Mother's financial situations may have changed while this appeal was pending, and the court may consider making separate findings for discrete periods of time. (See *In re Marriage of Barth* (2012) 210 Cal.App.4th 363, 371, 377.) The parties shall bear their own costs on appeal.

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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